



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2019-0103; FRL-10006-20-Region 3]

**Approval and Promulgation of Air Quality Implementation Plans; West Virginia;
Infrastructure Requirements for the 2015 Ozone Standard**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a state implementation plan (SIP) revision submitted by the State of West Virginia. Whenever new or revised national ambient air quality standards (NAAQS or standards) are promulgated, the Clean Air Act (CAA) requires states to make an initial SIP submission to provide for the implementation, maintenance, and enforcement of such NAAQS. This submission is required to address basic program elements, including, but not limited to, regulatory structure, monitoring, modeling, legal authority, and adequate resources necessary to assure attainment and maintenance of the standards. This type of SIP revision is commonly referred to as an “infrastructure” SIP and elements addressed in such a submission are referred to as infrastructure requirements. West Virginia made a submittal addressing most of the infrastructure requirements for the 2015 ozone NAAQS and later supplemented the submittal to address the interstate transport elements; EPA is not acting on the interstate transport elements at this time. EPA is approving these revisions in accordance with the requirements of the CAA.

DATES: This final rule is effective on **[insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2019-0103. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **For Further Information Contact** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Joseph Schulingkamp, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2021. Mr. Schulingkamp can also be reached via electronic mail at schulingkamp.joseph@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On December 18, 2019 (84 FR 69349), EPA published a notice of proposed rulemaking (NPRM) for the State of West Virginia. In the NPRM, EPA proposed approval of most portions of West Virginia's infrastructure SIP revision for the 2015 ozone NAAQS. The State submitted the infrastructure SIP on September 14, 2018 through the Department of Environmental Protection (WVDEP); this State later supplemented this submission on February 4, 2019 to address the interstate transport elements of CAA section 110(a)(2)(D)(i)(I). Additional background on West Virginia's submittal, infrastructure SIPs, and the ozone NAAQS can be found in the NPRM.

II. Summary of SIP Revision and EPA Analysis

West Virginia's September 14, 2018 infrastructure SIP submittal addressed the following infrastructure elements, or portions thereof, for the 2015 ozone NAAQS: CAA section 110(a)(2)(A), (B), (C), D(i)(II), D(ii), (E), (F), (G), (H), (J), (K), (L), and (M). The SIP submittal did not address the portion of element (C) which pertains to nonattainment new source review requirements, or element (I) which pertains to the nonattainment requirements of part D, title I of the CAA, because states are not required to address these elements by the 3-year submission deadline of section 110(a)(1), and will be addressed in a separate process.

EPA has analyzed the SIP submission and is making a determination that the submittal meets the requirements of the identified elements. A detailed summary of EPA's review and rationale for approving West Virginia's submittal may be found in the technical support document (TSD) for the NPRM which is available online at www.regulations.gov, docket number EPA-R03-OAR-2019-0103. Other specific requirements and the rationale for EPA's proposed action are explained in the NPRM and will not be restated here.

III. Response to Comments

EPA received three sets of anonymous comments in response to the NPRM. Two of the comments were difficult to interpret but did not appear to support EPA's proposed approval. EPA's best effort to interpret and respond to these two comments are also below.

Comment 1: The first commenter disagreed with EPA's proposed action with regard to whether the State has adequate resources. The commenter stated that EPA must review financial records and determine whether the State has adequate funding and if the funding is capable of sustaining

the number of employees on the State's staff.

Response 1: EPA disagrees with the comment. The comment does not provide any specific facts or analysis to support the concern about insufficient resources. An audit of the State's financial records is not required in order for EPA to determine that a state has met the requirements of CAA section 110(a). The CAA section 110(a)(2)(E)(i) requires that the State provide to EPA "necessary assurances" that it will have adequate funding and personnel to implement the relevant NAAQS. In accordance with CAA section 110(a)(2)(E), which requires that the State provide necessary assurances that it has adequate resources and personnel, EPA has concluded that the State has provided the necessary assurances of adequate resources and personnel in accordance with CAA section 110(a)(2)(E), as explained in the TSD included in the docket for this rulemaking action.

For example, West Virginia described in its submission that under State statutory authority it "employs adequate personnel and retains specialists under W.Va. Code section 22-5-4(a)(8) that are 'necessary, incident or convenient' to accomplish its statutory mandate to carry out" the West Virginia SIP, and currently maintains a staff of approximately 80 full time employees. West Virginia does not anticipate any changes in necessary resources for the five years following this submission. West Virginia indicates that the State has regulatory legal authority to establish fees to cover permitting costs beyond those already covered by its federally approved Title V operating permit program under 45CSR22, and that it receives revenue from fines and enforcement settlements (Air Pollution Control Fund). West Virginia also receives federal funds under CAA section 103 (Research, investigation, training, and other activities) and section 105 (Grants for support of air pollution planning and control programs), 42 U.S.C. 7403 and

7405. The State air pollution control programs also receive state general fund appropriations. Therefore, EPA has determined that West Virginia has provided necessary assurances that it has sufficient funding and personnel to meet the requirements of section 110(a)(2)(E) for the 2015 ozone NAAQS.

Comment 2: The second comment stated that EPA should disapprove West Virginia's infrastructure SIP submission because "the committee's position was supported by the oil and gas industry." The comment also suggested "[t]he SIP could be suspended because of its non-enforcement." The comment concluded by saying "[t]he infrastructure SIP should be disapproved immediately to stop it being used to bully corporations and public officials and allow another bill to be passed without the new part of the bill being gutted!"

Response 2: EPA disagrees with the comment. The commenter did not provide any information beyond its assertion in the comment as to why EPA should disapprove West Virginia's infrastructure SIP submission. The comment also failed to identify any part of the West Virginia SIP that the State is not enforcing. The Administrative Procedures Act does not require that EPA change its decision based on "comments consisting of little more than assertions that in the opinions of the commenters the agency got it wrong," when submitted without supporting data.

International Fabricare Institute v. E.P.A., 972 F.2d 384 (D.C. Cir. 1992). EPA's review of the infrastructure SIP submission, as explained in the TSD for this rulemaking action, shows that West Virginia has provided the necessary assurances that the State has the unambiguous authority to enforce its SIP and the measures contained therein. It is also unclear what the commenter was referring to in regard to some party using the infrastructure SIP to "bully corporations and public officials." An infrastructure SIP is simply a SIP submission to establish

that the state's existing EPA approved SIP, or the existing SIP as revised in the infrastructure SIP submission, meets the applicable requirements to implement, maintain, and enforce a new or revised NAAQS. The infrastructure SIP is required to address basic program elements, including, but not limited to, regulatory structure, monitoring, modeling, legal authority, and adequate resources necessary to assure attainment and maintenance of the new or revised standard.

Comment 3: The third comment suggested that EPA should disapprove West Virginia's infrastructure SIP submission in full, stating, "[m]uch of the infrastructure SIP could be used by the federal government for any purpose." The commenter also suggested that EPA has not been meeting legislative deadlines and that some members of Congress are not aware of the purpose of infrastructure SIP submissions.

Response 3: EPA disagrees with the comment to the extent that it calls for disapproving West Virginia's infrastructure SIP, because the commenter did not provide any information or basis to support such a disapproval. Although the commenter alleges EPA missed legislative deadlines, the commenter did not identify which deadlines EPA missed or why those deadlines would be relevant to this rulemaking. The Administrative Procedures Act does not require that EPA change its decision based on "comments consisting of little more than assertions that in the opinions of the commenters the agency got it wrong," when submitted without supporting data.

International Fabricare Institute v. E.P.A., 972 F.2d 384 (D.C. Cir. 1992). Nothing in the comment calls into question EPA's evaluation of West Virginia's infrastructure SIP for the 2015 ozone NAAQS for each applicable requirement in CAA section 110(a)(2), with the exception of section 110(a)(2)(D)(i)(I) which EPA is not acting on at this time, and concludes the State has

met the applicable requirements.

IV. Final Action

EPA is approving West Virginia's September 14, 2018 infrastructure submittal as a revision to the West Virginia SIP. EPA is approving the West Virginia's September 14, 2018 SIP revision as meeting the requirements of section 110(a)(2) of the CAA to implement, maintain, and enforce the 2015 ozone NAAQS, including specifically section 110(a)(2)(A), (B), (C), (D)(i)(II), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M) for this NAAQS. This final rulemaking action does not include action on section 110(a)(2)(I) or portions of section 110(a)(2)(C) referring to the permit program under part D, title I of the CAA. This rulemaking action also does not address section 110(a)(2)(D)(i)(I) which pertains to the interstate transport of emissions addressed by West Virginia's February 4, 2019 supplemental SIP revision; EPA will act on West Virginia's supplemental SIP revision in a later separate action.

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of

judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action, pertaining to West Virginia's infrastructure requirements for the 2015 ozone NAAQS, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: February 24, 2020.

Cosmo Servidio,
Regional Administrator,
Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart XX—West Virginia

2. In § 52.2520, amend the table in paragraph table (e) by adding an entry for “Section 110(a)(2) Infrastructure Requirements for the 2015 ozone NAAQS” at the end of the table to read as follows:

§ 52.2520 Identification of plan.

* * * * *

(e)* * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* * * * *				
Section 110(a)(2) Infrastructure Requirements for the 2015 ozone NAAQS	Statewide	9/14/18	<u>[Insert date of publication in the Federal Register], [Insert Federal Register citation]</u>	Docket #2019-0103. This action addresses the following CAA elements of section 110(a)(2): A, B, C, D(i)(II), D(ii), E, F, G, H, J, K, L, and M.

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